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# Introduction

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The twenty-first century has been characterized by two converging trends that lie at the heart of this book project. First, there has been a pronounced resurgence of religious conflicts not only between states but also, crucially, within a substantial number of states. From western Europe to Asia and the Middle East, religion has re-emerged as a salient factor in international as well as in domestic politics. Religious identity and religious law have become focal points of legal, political, and public tensions, particularly, but far from exclusively, in Muslim-majority regions. Second, the legacy of rule of law and good governance–oriented civil society initiatives of the 1990s has yielded an ongoing interest in legal and constitutional reform as a means of fostering or consolidating democratization and, where possible, promoting conflict mitigation or resolution. One expression of this trend has been the judicialization of politics, and the increasing role that law and courts have played in what was conventionally perceived as "political" affairs, on both the domestic and international levels. Even more significantly, a striking number of new constitutions have been written or rewritten over recent decades,[1] which has been the subject of growing interest among practitioners in developmental agencies and international organizations.[2]

[1] More than half of the world's constitutions were written or rewritten between 1975 and 2005 (Elkins et al. 2009: 215–222). Since then several additional countries adopted new constitutions (for example, Egypt, Fiji, Nepal, Tunisia, Vietnam, and Zimbabwe) while others initiated processes of constitution-making or made substantial amendments to their written constitutions (Turkey, Liberia, Nepal, Tanzania, Chile, Libya, Yemen, Sierra Leone, Trinidad and Tobago, the Solomon Islands, Myanmar, South Sudan, Sri Lanka, and Zambia) (Bisarya 2013: 1).

[2] Among the international organizations or developmental agencies involved in constitutional advising, one could mention for example: The International Crisis Group (ICG), International Development Law Organization (IDLO), Interpeace, International IDEA, Organization for Security and Co-operation in Europe (OSCE), The Public International Law & Policy Group (PILPG), the Peace Research Institute Oslo (PRIO), United Nations

These two trends have converged in recent years as tensions over religion–state relations have become increasingly more central in processes of constitution writing and rewriting around the world. Conflicts over religious law and religious identity were the focus of constitutional debates after the Arab uprisings in countries such as Egypt and Tunisia as well as in democratizing Asian countries such as Indonesia and Nepal. Even in Western democracies, questions concerning constitutional definitions of secularism have re-emerged with the growing role of religion in politics.[3] Surprisingly, however, this distinctive feature of the current wave of new constitutional exercises has remained relatively understudied: the challenge of democratic constitution-drafting under conditions of disagreement over the state's religious or secular identity. While there has been some attention to the broader question of constitution-making in divided societies (Choudhry 2007; Horowitz 2013; Lerner 2011; Lijphart 2004), the particular problems raised by *religious* conflicts have not garnered significant attention.

What role do constitution-drafters play in mitigating disagreements over the religious character of the state? How is religion debated by constitutional framers? What kind of constitutional solutions may reconcile democracy and human rights protection with the type of religious demands raised in democratizing or democratic states such as Egypt, Tunisia, and Indonesia? To what extent do the method and procedures of constitution-making affect the type of constitutional arrangements designed to address tensions over questions of religious law or religious identity? This volume is designed to tackle these questions by drawing on a broad range of case studies of past and current constitutional debates revolving around religious conflict, and by examining the various ways constitutional drafters have addressed religion-related tensions.

In exploring the role of religion in constitution-making, the book is situated at the intersection of several scholarly discussions in the study of constitutionalism, politics, and religion. The judicialization of politics and the legalization of social issues combined with a growing literature in the sociology of religion have fostered increased scholarly interest concerning the role constitutional law and adjudication play, or should play,

Development Programme (UNDP), United States Assistance for International Development (USAID), United States Institute of Peace (USIP), and German Agency for International Cooperation (GIZ).

[3] Constitutional debates about religion range from debates concerning abortion in several Western countries to new questions about the state's relationship to minority religions which have intensified with growing immigrant communities.

in balancing religious accommodation with a preexisting constitutional commitment to liberal rights protections (Arjomand 2008; Cohen and Laborde 2015; Durham et al. 2013; Hirschl 2010; Jacobsohn 2005; Mancini and Rosenfeld 2014; Venter 2015; Zucca 2012; see also Künkler, Lerner, and Shankar 2016). These studies are interested by and large in examining how religious disputes are addressed in existing constitutional arrangements, and thus they rarely consider questions of constitutional design. Further, because much of this literature focuses on the challenge of religious identity–based claims in the liberal constitutional tradition, societies grappling with these questions outside of the liberal tradition have received less attention. By contrast, the literature that focuses specifically on constitutional design, whether through large-*N* studies or through more qualitative studies of single cases, tends to discuss institutional mechanisms for regulating intergroup competition to facilitate democratic governance without attending to the particular challenge of core normative conflicts such as those grounded in religious claims and identities (e.g. Arato 1995, 2016, Elkins et al. 2009, Negretto 2013; Galligan and Versteeg 2013; Ginsburg 2013). Even the studies that focus on constitutional design in divided societies tend to focus on institutional aspects of the constitution and on issues of distributive competition, paying comparatively little attention to tensions over rhetorical/symbolic usage of religious conceptions in constitutional texts as part of the struggles to define the identity of the state as a whole (Choudhry 2008: 15–88; Horowitz 1985, 2011; Lijphart 2004: 96–109). Finally, scholars engaging in qualitative empirical studies of constitutional debates in the context of religious differences usually focus on a single case study, providing an analysis bounded by the unique historical, cultural, political, and legal context of that case.[4]

In short, there is a gap in the literature when it comes to addressing the question of the role of religion in democratic constitution-making in comparative context. This book aims at filling the gap by exploring the various ways constitutional drafters have addressed religious conflicts in fourteen different countries. The cases examined in this volume include Egypt, Germany, India, Indonesia, Israel, Japan, Lebanon, Morocco, Norway, Pakistan, Senegal, Sri Lanka, Turkey, and Tunisia. The focus of the case studies is on the *drafting process* and its relationship to outcomes, taking the constitutional provisions themselves not as

[4] See, e.g. on Turkey, Bâli (2012) and Özbudun and Genckaya (2009). On India, see Bhargava (2010). On Indonesia, see Hosen (2007) and Horowitz (2013). On Malaysia, Stilt (2015). On Egypt, Brown and Lombardi (2012). On Sri Lanka, Schonthal (forthcoming).

a starting point for the discussion but as the object of study. Drawing from primary archival sources and/or interviews with those involved in the constitution-drafting process, chapters that study individual cases analyze the central points of disagreement in the relevant constitutional debate, the process of deliberation, and the types of constitutional arrangement adopted by the drafters as well as the decisions to leave certain issues outside of the constitutional document. In chapters with a comparative approach, the same questions guide comparisons across one or more cases.

By exploring the political deliberations and compromises made during the constitutional drafting process, the case studies analyze not only the provisions included in the final document but also previous drafts and suggestions that were rejected by the drafters. The same is true for subjects of debate on which compromises may have been struck before the drafting process began. Further, the historical and political contexts of each case – including the legacies of earlier colonial or imperial periods, patterns of elite composition, the ideological commitments of key participants in framing constitutional debates, and the determinants of decision-making processes adopted – inform the ability of the studies to offer a novel assessment not only of the drafts ultimately promulgated but also of the alternative paths that might have been pursued. Taken together, the case studies enhance our understanding of the contested nature of religion–state relations in any particular constitution and also provide a unique perspective on the interplay between law and politics in contexts of deep disagreement over basic norms and values of the state.

Further, by enlarging the scope of comparative analysis to relatively understudied cases, such as Sri Lanka, Senegal, Indonesia, Morocco, Lebanon, Pakistan, and Japan, the chapters offer scholars as well as practitioners involved in constitution-drafting processes a wider range of potential models and lessons drawn from recent experience. By and large, the Western constitutional imagination of models to regulate religion–state relations has relied on a narrow set of constitutional narratives, focusing particularly on the American Constitution, the French Revolution, and a few additional examples drawn from Western democracies (Klein and Sajó 2012; Whittington 2008: 294–95). By broadening the range of empirical examples to draw upon, and by focusing on empirical studies of recent and current constitution-writing projects that involve sustained controversies over the question of religion, the case studies provide a comparative basis for an empirically

grounded theory, which we outline in the concluding chapter of this volume (Chapter 15). In this light, the cases of democratizing Muslim-majority states such as Senegal (Chapter 6), Indonesia (Chapter 8), and Tunisia (Chapter 14) are of particular interest. Constitutional innovations in these, and other, countries have developed important, if provisional, accommodations for religious law while preserving individual rights protections. These Muslim cases are more likely to influence constitutional drafters in newly democratizing Muslim-majority states as potential models for their own situations than the conventional models drawn from the North Atlantic context, which derive from earlier debates in Christian-majority societies.

Some of the chapters focus their analysis on questions of religious identity and religious symbolism, (e.g. whether the term "god" is mentioned in the constitution, as in Germany; see Chapter 4). Yet many of the cases discussed in this book have in common a specific interest in more substantive issues such as rights of religious minorities (Morocco; see Chapter 13), status of religious law (Egypt and Tunisia; see Chapters 12 and 14), and the interpretive authority accorded to religious/political institutions (Pakistan; see Chapter 10). The wide range of cases that consider religious law and its place in constitutional debates, a question not often addressed in the literature on religion–state relations, helps correct for biases in the literature that may be a consequence of models of religion–state relations extrapolated largely from the history of Western Christendom. By engaging with a spectrum of constitutional models in democratic systems that offer some accommodation for religious (personal status) law, the cases shed light on normative insights previously understudied in the literature on comparative constitutional design.

At the same time, the meaning of "religion" or of "secular" has been understood differently by constitutional drafters in different countries, and affects the way these concepts have been analyzed in different chapters. Given this variation among the cases presented in this volume concerning the nature and intensity of the religious conflicts debated by drafters in different countries, an immediate question to be addressed is whether there is anything specifically distinctive that unites these cases and presents common theoretical questions. In other words, is there anything special in the way constitutional drafters address religious conflicts? Or, in short, are constitutional debates on religion special?

## Is Religion (in Constitution-Drafting) Special?

Religion plays an extensive role in contemporary constitution-drafting. Indeed, while the salience of religion as a source of conflict has ebbed and flowed, the importance of religious identity to the political debates that inform constitution-drafting has been relatively continuous over the last century. Whether in the context of postcolonial state-formation or in more recent constitutional exercises, a large proportion of constitutions have been drafted against the backdrop of significant contestation over questions of state–religion relations. A brief comparative view reveals that almost all constitutions in the world today have some reference to religion. Out of 194 constitutions in existence today, 186 mention the word "religion" and 183 include some form of formal guarantee of religious freedom.[5] A total of 114 constitutions (58.7 percent) mention terms such as "God," "the divine," or other deities.

Based on the research contained in the following chapters, as well as an examination of further cases that lie beyond the scope of this volume, we believe the answer to the question of whether religion raises special questions for constitution-drafting is a qualified yes. The qualification of our positive answer stems, first and foremost, from the empirical difficulty in defining the boundaries between religious conflicts and other related societal, ideational, or political conflicts. There is often an overlap between religious divisions and other axes of tension, including those with ethnic, linguistic, class, or regional characteristics.

Another difficulty that challenges any attempt to develop a theoretical framework based on comparative analysis of religion in constitution-drafting stems from the degree of variation with respect to the nature of the conflict underlying the constitutional debates and the level of intensity by which religious issues were discussed by constitutional drafters. This is because the nature and intensity of the religious divisions that characterize different societies, and which are reflected in their constitution-drafting debates, vary significantly.[6] Different religious traditions also present different kinds of challenges in a constitution-drafting context: Catholicism raises the question of structuring relations between the state and a hierarchically organized external authority, the Vatican; Islam raises the question of the relationship between state law and shari'a.

[5] Data from Comparative Constitutions Project. See also Ibán (2013: 37–55).

[6] This variation is linked to documented decline in religious beliefs in some countries, as well as to other historical developments, including the emergence of secularism. See, e.g. Taylor (2007); Norris and Inglehart (2004); Casanova (1994).

Religious traditions represent an array of conceptions of authority, bureaucratized clerical institutions, and legal traditions governing everything from the structure of family to the content of education. Given the variation across religious traditions, there may be no single, universally applicable way of defining precisely how religion is distinctive.[7]

Moreover, any comparative analysis of constitutional debates on religion tackles the difficult challenge of definitions. Terms such as "religion," "religious," "secular," or "secularism" are often understood differently by different members of the same society, let alone the great variation in their meaning across different societies, cultures, or historic periods (Asad 2003; Berger et al. 2008; Bhargava 1998; Bowen 2010: 680–694; Bruce 2002; Casanova 2006; Calhoun et al. 2011; Katznelson and Jones 2010; Laborde 2015; Taylor 2010; Warner et al. 2010).

While we are aware that "religion" is a contested term and that there is a substantial literature addressing such definitional questions,[8] we have left the debates over the definition of "religion" outside the scope of this book. Rather, in this chapter and in the case study chapters included in the volume, we adopt the definition of religion employed by the actors and groups under study. That is, if the parties believe that their disagreements are over questions of religion or have a religious character, we accept that designation.

As the rest of the book demonstrates, regardless of the specific nature of the religious divisions and their intensity across cases, there is something about conflicts over religious questions that cannot be reduced to or conflated with other kinds of material or identitarian conflict. The debates canvassed in the chapters are not just proxies for conflicts over class, geographic, ethnic, or linguistic differences. Rather, they reflect conflicts over beliefs, values, and normative commitments that have proven to be remarkably durable. We do not argue that all societies marked by religious diversity experience such conflicts, but those societies marked by religious conflict share common features that are not present where conflicts are less over beliefs and values than over interests

[7] For some examples of long-standing debates about the definition of religion and the question of whether it is distinctive across a number of contexts and disciplines, see, Geertz (1973: 87–125); Asad (1993: 27–54); Platvoet and Molendijk (1999); Schwartzman (2012: 1351).

[8] For example, a definition of "religious" parties, common to the literature on political parties, emphasizes the fact that by contrast to other ideological parties, in religious parties the basis of the party's programs is determined by tradition and its interpretation by clerics and/or religious institutions outside of the party itself (Gunther and Diamond 2003: 182).

and distributional questions. While it is difficult to isolate the ideational elements of religious divisions from the social structures in which they are embedded, political fragmentation over questions of religion produces distinctive challenges.

Religious conflicts present a special problem in the context of constitution-drafting for another reason. Both religions and constitutions, to borrow from John Searle's terminology, include "constitutive rules" (Searle 1995: 27–28). In contrast to "regulative rules," which regulate activities present in a society, constitutive rules create the very possibility of certain activity (*ibid.*).[9] Both religions and constitutions not only regulate human behavior and activities, but also create the very possibility of social, political, and legal practices and institutions. The practices and institutions created by religions often compete with the political and legal institutions brought into existence by constitutions. For example, in the case of parallel judicial institutions, which exist in pluri-legal systems, especially in the area of personal status law, such competition can be quite pronounced (Sezgin 2013).

Historically, the question of the separation of religious and temporal authority has long been one of the central battles of modernization and state-formation, especially in the European context. This was in part because, unlike other identity categories or sources of affiliation, religious authorities make competing demands of obedience on the individuals constituting the state (Stepan 2001: 213–253). In some religious traditions, religion is also a competing source of law and invokes a legal tradition outside of the state (Revkin 2014, 34–45). Elsewhere, there is a long history of religious political parties that structure political contestation in ways that make religious identity more salient (Fogarty 1957; Kalyvas 1996). Further, for societies that are former colonies, colonial governors often used religion to legally define the communities in the territories under their administration. Thus colonial legacies and the legal patrimony inherited by the postcolonial state are marked by the entrenchment of religion in law. These characteristics of religion continue to have important institutional and ideational implications in contemporary religiously divided societies undertaking constitution-drafting exercises. As the chapters in this volume demonstrate, these

[9] Searle uses the example of driving rules versus chess rules to explain the difference between the two types of rule. "Don't drive on the right side" is a rule that regulates driving, an activity that existed prior to any driving rules. By contrast, rules of chess do not regulate an antecedently existing activity but rather "the rules of chess create the very possibility of playing chess."

and many other factors affect the constitutional debates on issues related to religion, including, for example, colonial legacies, geographical regionalism, the composition of drafters (e.g. whether external actors or domestic representatives), or the type of drafting process (e.g. whether top–down imposition or bottom–up participatory process).[10]

## The Limits of Constitutional Design

The case studies discussed in the following chapters vary not only in the understanding of religion, but also with respect to the understanding of what constitutions should or can do. They also vary in the definitions that they use for common constitutional terminology. While in some cases the analysis of the debates focuses on the constitution with a capital C, referring to the formal written constitution, in other cases the debates under study concern the constitution with a lowercase c, namely referring more broadly to the material constitution,[11] which may include judicial and legislative interpretations. The chapters on West Germany (Chapter 4) and Tunisia (Chapter 14), for example, exemplify the former case, while the chapters on Norway (Chapter 2) and Pakistan (Chapter 10), the latter. In some cases, chapters refer to both meanings of constitutions, as in the chapters on Japan (Chapter 3) and on Indonesia (Chapter 8).

While the chapters vary in their approaches, terminology, and factors that influence the drafting process, the book rests on the presumption that a careful qualitative examination of cases where religion was a significant axis of contention in the constitutional process would help identify issues to be taken into consideration by those engaged in contemporary drafting projects under conditions of religious division. Studying a range of societies grappling with religious divisions while writing constitutions provides a basis for new theoretical contributions drawn from comparative experience. Of course, there can be no single set of constitutional design prescriptions that would apply across contexts. Moreover, the empirical cases demonstrate that whether intentionally or unintentionally, religion is often regulated outside the formal framework of the written constitution through ordinary legislation or judicial

[10] We have addressed these issues in the concluding chapter of this book (Chapter 15).

[11] According to Hans Kelsen, material constitution is a system of formal and informal rules that regulate the political order and that could be based on conventions, customs, and judicial interpretations. Kelsen distinguishes between such a constitutional system and a formal constitution, which generally refers to a written document. See Kelsen 1961.

interpretation. Nevertheless, the book enlarges the menu of options already defined in the literature through careful consideration of insights to be gleaned from comparatively understudied cases. These insights are presented in the concluding chapter of this book (Chapter 15).

As discussed in greater depth in that final chapter, the case studies expand the range of constitutional tools and strategies discussed in the comparative legal and political literature by identifying novel design features drawn from the cases and their merits, beyond the common normative framework of liberal constitutionalism. The lessons drawn from these understudied cases are not presented to displace the value of the liberal constitutional model, which has dominated the literature on constitution-making in general, and in the context of religious disagreements in particular (Bâli and Lerner 2016). Rather, the book aims at supplementing the literature by revealing an array of previously underexamined constitutional solutions of potential interest in constitution-drafting exercises.

Most significantly, when taken together, the studies included in this book reveal that the expectation that constitution-drafting should be designed to resolve long-lasting and deeply rooted societal disagreements on religious issues is often unrealistic, and that constitutional drafters in religiously divided societies often acknowledge the limited role formal constitutions may play in mitigating religious conflicts. Most contributions to this volume diverge from the commonly held presumption that the constituent power rests with a clearly defined, preexisting people, or that constitution-writing is by definition an act of invention (Preuss 1995: 109, 122–123; Klein and Sajó 2012: 435). The cases considered in this volume rarely exemplify the model of a constitution that creates a new order ex nihilo. Nor are the cases examples of "we the people" engaging in higher-order law-making through deliberation in a "constitutional moment" (Ackerman 1991). Rather, constitution-drafting exercises that are undertaken by societies marked by disagreement over matters of identity and power-sharing sometimes arrive at more provisional configurations. Under conditions of religious disagreement, constitution-drafting exercises often draw on a mix of extant constitutional repertoires – from the underlying society, regional experience, or international influences – and novel formulae for coexistence to fashion constitutional bargains at a particular juncture. These bargains, in turn, may produce new and shared civic identities and durable compromises to mitigate conflict or thinner modus vivendi that serve a specific purpose at a critical time. Our alternative starting-point, which neither assumes